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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1290

BROWN & WILLIAMSON TOBACCO CORPORATION, et al.,
Petitioners,

v.

PAUL RAND DIXON, ACTING CHAIRMAN,
FEDERAL TRADE COMMISSION, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND APPLICATION FOR STAY PENDING REVIEW BY THIS COURT

March, 1976

(Counsel Listed on Inside Cover)

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

ERNEST PEPPLES
BROWN & WILLIAMSON TOBACCO CORP.
Of Counsel

THOMAS F. AHRENSFELD
ALEXANDER HOLTZMAN
PHILIP MORRIS INCORPORATED
Of Counsel

MAX H. CROHN, JR.
R. J. REYNOLDS TOBACCO COMPANY
Of Counsel

ARTHUR STEVENS
LORILLARD TOBACCO
Of Counsel

C. F. HETSKO
AMERICAN BRANDS, INC.
Of Counsel

JOSEPH GREER
LIGGETT & MYERS INCORPORATED
Of Counsel

MARTIN LONDON
LEWIS A. KAPLAN
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
345 Park Avenue
New York, New York 10022
Attorneys for Brown & Williamson Tobacco Corporation

ABE KRASH
JEROME I. CHAPMAN
ALBERT H. KRAMER
ARNOLD & PORTER
1229 Nineteenth Street, N.W.
Washington, D.C. 20036

DONALD FRIED
CONBOY, HEWITT, O'BRIEN & BOARDMAN
20 Exchange Plaza
New York, New York 10005
Attorneys for Philip Morris Incorporated

PAUL C. WARNKE
JOHN F. KOVIN
HAROLD D. MURRY, JR.
CLIFFORD, WARNKE, GLASS, MCILWAIN & FINNEY
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

DAVIS, POLK & WARDWELL
One Chase Manhattan Plaza
New York, New York 10005
Attorneys for R. J. Reynolds Tobacco Company

IRVING SCHER
STANLEY A. ROTHSTEIN
WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10022
Attorneys for Loew's Theatres, Inc.

DANIEL J. O'NEILL
CHARLES K. O'NEILL
CHADBOURNE, PARKE, WHITESIDE & WOLFF
30 Rockefeller Plaza
New York, New York 10020

EUGENE R. ANDERSON
ANDERSON, RUSSELL, KILL & OLICK, P.C.
630 Fifth Avenue
New York, New York 10020
Attorneys for American Brands, Inc.

LAWRENCE G. MEYER
LINDA E. BUCK
PATTON, BOGGS & BLOW
1200 Seventeenth Street, N.W.
Washington, D.C. 20036

GRAINER R. BARRETT
75 Rockefeller Plaza
New York, New York 10020
Attorneys for Liggett & Myers Incorporated

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND APPLICATION FOR STAY PENDING REVIEW BY THIS COURT

Petitioners[1] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in these consolidated cases on December 22, 1975. Petitioners also respectfully request an order of this Court staying the accumulation of civil penalties under 15 U.S.C. § 45(*l*)

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[1] Petitioners are the major American cigarette manufacturing companies: Brown & Williamson Tobacco Corp., Philip Morris Inc., R. J. Reynolds Tobacco Co., Loew's Theatres, Inc. (of which Lorillard is a division), American Brands, Inc., and Liggett & Myers, Inc.

(Supp. III, 1973), pending final judgment by this Court in this proceeding.

OPINIONS BELOW

The opinion of the court of appeals (A. 3a) appears at 1975-2 CCH Trade Reg. Rep. ¶60,649. The opinion of the district court (A. 16a; App'l App. A294-301[2]) appears at 1975-2 CCH Trade Reg. Rep. ¶60,473. Neither opinion is yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1975. (A. 3a.) A timely petition for rehearing filed by petitioner American Brands, Inc., was denied by order entered January 30, 1976. (A. 21a-22a.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

In an unbroken line of cases starting with *Ex parte Young,* 209 U.S. 123 (1908), this Court has held that persons adversely affected by final administrative actions are entitled, as a matter of due process, to an opportunity safely to test the validity of the administrative determination in court, unencumbered by the inhibitory effects of overhanging, continually accruing monetary penalties during the litigation. This principle has been held to have particular force where, as here, both courts below found "that [petitioners] have doubtless posed serious questions" as to the correctness

[2] "App'l App." refers to the Appendix filed in the court of appeals, copies of which have been lodged with the Clerk of this Court.

of the agency action. The question presented is whether the court of appeals erred in holding that this principle does not apply to requests for relief *pendente lite* in any case challenging the validity of an administrative determination that the affected parties had violated a Federal Trade Commission consent decree.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fifth Amendment to the Constitution of the United States, Section 16(a)(1) of the Federal Trade Commission Act, 38 Stat. 717, *as added,* 52 Stat. 11, *as amended,* 15 U.S.C. §56(a)(1) (Supp. IV, 1974), and Section 5(*l*) of the Federal Trade Commission Act, 38 Stat. 719, *as amended,* 15 U.S.C. §45(*l*) (Supp. III, 1973), appear in the Appendix. (A. 1a.)

PRELIMINARY STATEMENT

This case arises out of a Federal Trade Commission determination that petitioners have violated certain FTC consent orders. The determination exposes petitioners to the threat of enormous, daily-mounting civil penalties. Petitioners strenuously dispute this determination, and both courts below explicitly acknowledged that petitioners have raised "serious questions on the merits." (A. 14a, 17a.)

The Commission's determination confronts petitioners with a serious dilemma. They must either forgo their constitutional right to judicial review of an agency action they believe to be illegal—and as to which they have raised substantial questions—or they may pursue their judicial remedy, but only at the inhibiting risk of massive accumulating monetary pen-

alties. To resolve precisely this sort of dilemma and to protect the due process right of judicial review, this Court has repeatedly held that the party challenging the agency action is entitled to a stay of penalties pending judicial consideration of the issues.

Contrary to the controlling decisions of this Court and the decisions of other federal courts, the court of appeals in this case refused to stay the accumulation of penalties *pendente lite*. It did so on the basis of a narrowly restrictive and, we submit, erroneous reading of this Court's precedents. The court below held that the right to a stay of penalties *pendente lite* obtains in cases challenging the validity of an agency order, but not in cases challenging the validity of an agency determination that a consent order has been violated. If allowed to stand, the decision below will severely infringe the due process rights of parties who, like petitioners, raise substantial questions as to the validity of an administrative action and who seek the opportunity to challenge the agency action in court, free from the chilling effect of a ticking penalty meter.

STATEMENT

1. The Consent Orders and Petitioners' Compliance

Beginning about April 15, 1971, some cigarette manufacturers voluntarily included in certain of their advertisements the caution notice which Congress had prescribed for all cigarette packages.[3] On March 30,

[3] The text of the caution notice—"Warning: The Surgeon General Has Determined That Cigarette Smoking is Dangerous To Your Health"—is prescribed by the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 2, 84 Stat. 86, 15 U.S.C. § 1333 (1970). The statute mandates the use of the caution notice only on cigarette packs and cartons. The consent orders at issue here provide for the use of the caution notice in various advertising and promotional materials.

1972, after extensive negotiations with petitioners—the six major domestic cigarette manufacturers—the Federal Trade Commission issued six identical consent orders spelling out in minute detail the manner in which the caution notice was to be displayed on various specified forms of cigarette advertising and promotional material. (App'l App. A24-35.) All six companies promptly began compliance with the decree.

Each company was informed by the Commission in December 1972, after submitting the compliance report required by the decree, that "no compliance action by the Commission is indicated at this time." (App'l App. A43.) Thereafter, the Commission twice publicly reported to Congress—at year-end 1972 and year-end 1973—that "all cigarette advertisements observed by the Commission Staff were being published in accordance with the terms of these orders."[4] All of the companies have relied on these Commission pronouncements, and all of them believe that their advertising has been and is in compliance with the consent orders.

2. The Commission's Determination

In the spring of 1974, the Commission's Compliance Division informed petitioners that an investigation had been instituted into their compliance with the consent orders. Petitioners cooperated in the staff's investigation, and in March 1975, petitioners submitted a memorandum to the Commission in support of their position that they were in compliance with the orders. (App'l App. A315-497.)

[4] Federal Trade Commission, *Report to Congress Pursuant to the Public Health Cigarette Smoking Act*, December 31, 1972, p. 2. See also Federal Trade Commission, *Report to Congress Pursuant to the Public Health Cigarette Smoking Act*, December 31, 1973, p. 1.

By separate but similar letters dated August 1, 1975, addressed to each company, the Commission notified the companies that it "has determined" that each company had violated its consent order.[5] With few exceptions, the letters neither identified particular advertisements which the Commission deemed violative of the consent orders, nor indicated specific measures the manufacturers should take to "remedy" the alleged violations.

Rather, the Commission's letters referred to six generalized categories of alleged violations. With respect to two of the categories, the Commission stated that it would "hold a civil penalty action in abeyance for 180 days." If at the expiration of that period the companies had not "remedied" the alleged violations in accordance with the Commission's unarticulated demands, the Commission threatened to seek "civil penalties and other relief" for the alleged violations. (A. 25a.)

As to the remaining four categories of alleged violations, the Commission stated that it would notify the Attorney General of its "intention to commence an action for civil penalties and other relief," and pursuant to the FTC Act, as amended,[6] would tender the cases to him for prosecution. (A. 23a.) There was no assurance when the Attorney General would commence suit, or, if he determined not to bring suit and accord-

[5] A copy of the letter sent to one of the companies, illustrative of the letter sent to each, appears in the Appendix. (A. 23a.) The letters appear in App'l App. at A36-38; A58-61; A79-81; A101-03; A164-66; and A185-87.

[6] Federal Trade Commission Act, Section 16(a)(1), 15 U.S.C. § 56(a)(1) (Supp. IV, 1974).

ingly remanded the matter to the Commission, when the Commission would bring its own suit. The only points made certain by the Commission's letters of August 1, 1975 were that the Commission had determined that each of the companies had violated the consent orders and that, at some indefinite future time, the government would institute actions for civil penalties with respect to these alleged violations.

3. The Present Litigation

The Commission's determination presented petitioners with a grave dilemma. They could either continue their existing practices at the peril of massive mounting civil penalties or change their advertising in an effort to meet whatever demands the Commission might make. The first alternative did not allow an undeterred opportunity for judicial review, since it required the companies, as the cost of such review, to stand by each day while potential penalties continued to mount.[7] The second alternative entailed the incurring of substantial costs without any assurance that the revisions in advertising and promotional materials would satisfy the Commission's demands. More importantly, it would have compelled the companies to forgo

[7] Paragraph 8 of the 1972 Consent Order Agreement (*e.g.*, App'l App. A26) provides that each petitioner "may be liable for a civil penalty of up to $5,000 for each violation of the order after it becomes final." The statute, Section 5(*l*) of the Federal Trade Commission Act, *as amended*, 15 U.S.C. § 45(*l*) (Supp. III, 1973), provides that "[e]ach separate violation of such an order shall be a separate offense . . . ." As the court of appeals observed, the Commission has in the past taken the position that each advertisement amounts to a separate violation (A. 9a, n. 7), a position that has been sanctioned by the same court of appeals. *United States* v. *J. B. Williams Company, Inc.*, 498 F.2d 414, 435-38 (2d Cir. 1974). Under this theory, which the government has adopted in this case, the potential liability of *one* company for *one* ad in *one* edition of the Sunday New York Daily News, with a circulation of three million, could be $30,000,000,000. (A. 9a, n. 7.)

their right to a judicial test of the validity of a Commission determination they believe to be erroneous and which both courts below agreed were subject to serious question.

Faced with this Hobson's choice, each petitioner filed an action in the United States District Court for the Southern District of New York on August 15, 1975—within days after receipt by each petitioner of the Commission's August 1 letter. The complaints sought a declaratory judgment that the determinations set forth in the FTC's August 1 letter were inconsistent with the consent orders and otherwise contrary to law and that petitioners were not liable for civil penalties.[8] Petitioners also requested a stay *pendente lite* of the accumulation of penalties under Section 5(*l*). They argued that the Constitution affords them the right to contest judicially the validity of the FTC's determination without having to incur the risk of potentially massive penalties as the price of admission to the courthouse.[9]

The government conceded in the district court that the only basic difference between petitioners' declaratory judgment action and the civil penalty action that the government had determined to file was that the former substantially advanced the time when a stay of penalties could be sought. (App'l App. A257-58, A275-76, A285-86.) It nonetheless argued that petitioners

[8] Named as defendants were the Federal Trade Commission, the individual Commissioners, the United States, and the Attorney General. Former Chairman Engman of the FTC was the lead defendant. He has since resigned and, pursuant to Rule 48, petitioners have substituted Acting Chairman Dixon as the lead defendant.

[9] The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331, 1337, 28 U.S.C. §§ 2201-02, and 5 U.S.C. §§ 702-06. In the court of appeals, see pp. 9-10, *infra*, petitioners also invoked the All Writs Act, 28 U.S.C. § 1651, as an alternative basis of jurisdiction to issue a stay of penalties. See 28 U.S.C. § 1653.

should be required to await the enforcement suit. In an affidavit, the government further conceded that "One purpose of these August 1, 1975 letters (especially that part of them that granted [petitioners] a six-month grace period to cure some of their violations) was to give [petitioners] an opportunity then to come forward with a reasonable settlement proposal . . . ." (App'l App. A228.) In this way, the Commission acknowledged its intentions to take advantage of the dilemma its determination created for petitioners by bringing pressure on them to forgo a court challenge to the Commission's action.

4. The Decisions Below

On August 28, 1975, the district court (Tenney, J.) denied the stay *pendente lite*. Judge Tenney assumed that the companies had "at least raised serious questions going to the merits." (A. 17a.) He held that a stay was not required because the penalty provisions of the FTC Act only fixed the upper limits of the companies' liability for each violation, the amount of the penalties ultimately to be assessed being within the trial court's discretion. (A. 19a.)

Following an expedited hearing, the court of appeals affirmed Judge Tenney's ruling. That court agreed that the companies had "doubtless posed a serious question on the merits." (A. 14a.) Further, the court acknowledged the general right under the due process clause of the Fifth Amendment to test the validity of administrative action without facing substantial mounting penalties as a consequence. But the court ruled that this safeguard was not applicable here on the ground that the companies sought to test not the "validity" of the underlying orders, but the FTC's "interpretation" of those orders at the compliance stage. (A. 10a-11a.) While noting that the "cumulative aspect of [the civil]

. . . penalties is severe" (A. 11a), the court concluded that this deterrent to judicial review was nevertheless valid, because the penalties would ultimately be "subject to the limitation of judicial discretion." [10] (A. 12a.)

It is this ruling denying a stay *pendente lite* which petitioners now seek to have this Court review.

5. Related Enforcement Litigation

The government conceded before Judge Tenney that it could bring its civil penalty actions as compulsory counterclaims in the petitioners' suits in New York. Instead, however, the government moved to dismiss the complaints, and on October 17, 1975—two and a half months after the determination letters—it filed an enforcement action against each petitioner in the United States District Court for the District of Columbia.[11]

On November 5, 1975, Judge Tenney, while "not prepared to . . . hold" that petitioners' dilemma did not present a case of "exceptional need and unfairness," [12] nonetheless granted the government's motion to dismiss. The district judge recognized that there was a

[10] Petitioners also sought a stay of penalties pending the determination of the appeal. The court of appeals never explicitly acted on petitioners' motion.

[11] The complaint against each petitioner covers only the four categories of alleged violations as to which the Commission's August 1 letters had stated its intention immediately to institute suit. See p. 6, *supra*. The remaining two categories of alleged violations, as to which the Commission stated it would hold civil actions in abeyance for 180 days, are not involved in the enforcement proceedings. By contrast, all aspects of the Commission's determination are involved in the instant proceeding.

[12] *Brown & Williamson Tobacco Corporation, et al.* v. *Engman*, 1975-2 CCH Trade Reg. Rep. ¶ 60,607 at 67,674.

jurisdictional basis for petitioners' actions, but he declined to exercise jurisdiction, as a matter of discretion, in light of the pendency of the enforcement actions which had by that time been instituted in another court.[13]

On January 20, 1976, the United States District Court for the District of Columbia (Bryant, J.) granted the petitioners' motions to transfer the government's enforcement actions from that district to the Southern District of New York. Noting that the enforcement suits charged petitioners "with technical violations of the Consent Decree, for which civil penalties may be assessed," the court ruled that transfer of the proceedings to New York would best serve "the convenience of the parties and witnesses and the interests of justice . . . ."

REASONS FOR GRANTING THE WRIT

This case raises an important and recurring question relating to judicial review of administrative orders. The right to effective judicial review is severely inhibited if parties are subject to the risk of ongoing civil penalties for alleged violations of an agency order during the pendency of judicial proceedings. The novel decision of the court of appeals improperly constricts the scope of the procedural due process doctrine long established by this Court in *Ex parte Young*, 209 U.S. 123 (1908), and the many cases which followed it. In addition, the decision of the court below conflicts with those of other federal courts, including the recent decision of the three-judge court in *Ford Motor Co.* v. *Cole-*

[13] Petitioners' appeals from Judge Tenney's dismissal order are currently pending in the United States Court of Appeals for the Second Circuit.

man, 402 F. Supp. 475 (D.D.C. 1975), direct appeal pending No. 75-870. The decision below deprives petitioners of their right to an uninhibited judicial review of the serious questions they have posed as to the validity of the FTC's determination, and it casts serious doubt upon the applicability of this Court's established due process doctrine in the expanding area of administrative enforcement proceedings. The writ should be granted to clarify this important question of federal constitutional and administrative law.

I. The Decision of the Court Below is in Conflict with the Decisions of This Court.

1. Ever since *Ex parte Young,* it has been the accepted rule that whatever the genesis of an administrative order,

> "the right to a judicial review must be substantial, adequate and safely available—but that right is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law." *Wadley So. Ry. Co.* v. *Georgia,* 235 U.S. 651, 661 (1915).

This right must be available "before any liability for penalties attaches." *St. Louis I.M. & So. Ry.* v. *Williams,* 251 U.S. 63, 65 (1919). Where necessary to preserve this right,

> "a permanent injunction should . . . issue to restrain enforcement of penalties accrued pendente lite, provided that it also be found that the plaintiff had reasonable ground to contest [the administrative order in question]." *Oklahoma Operating Co.* v. *Love,* 252 U.S. 331, 338 (1920) (Brandeis, J.).

To the same effect is this Court's decision in *St. Regis Paper Co.* v. *United States,* 368 U.S. 208, 225-27 (1961), *aff'g* 285 F.2d 607 (2d Cir. 1960). *See also United States* v. *Pacific Coast European Conference,* 451 F.2d 721 (9th Cir. 1971).

The court below recognized the continuing validity of these decisions. But it erred when it found them inapplicable on the theory that the present proceeding deals with an agency's "interpretation" of orders at the compliance stage and not the validity of the orders themselves. Petitioners respectfully submit that this distinction is without a constitutional difference.

It is irrelevant for constitutional purposes whether the issue in dispute is the validity of agency orders or, as here, the validity of a final agency determination that those orders have been violated. The crucial factors under the *Ex parte Young* line of cases are (i) that the agency has taken adverse action and (ii) that the affected party cannot obtain a bona fide judicial test of the validity of that action except at the risk of mounting, massive penalties. Both factors are present in this case.

Petitioners' right to a stay of penalties *pendente lite* is buttressed by the substantiality of the questions they have raised as to the correctness of the FTC's determination. Both the district court and the court of appeals recognized that "serious questions" on the merits were raised. The threat of penalties is designed to force petitioners to abandon their present lawful conduct and to acquiesce in an interpretation of the decree that they regard as erroneous. This is precisely the result that *Ex parte Young* and related cases intended to foreclose.

The three cases cited by the court below to support its novel constitutional rule [14] are inapposite. None of them involve the situation, presented here, in which parties could not challenge adverse agency action except at the risk of accumulating penalties.

In *ITT Continental Baking Co.,* a suit for penalties for alleged violations of an FTC consent decree, the government did not question the right of the respondent to litigate the validity of the FTC's determination that it had violated the consent decree without facing the risk of additional penalties. Unlike the Commission's claims in the present case, penalties were sought only from the date of the alleged violation "to the date of filing of the complaint . . . ." 420 U.S. at 229. Similarly, in *Beatrice Foods Co.,* the government sought penalties only to the date of the filing of its complaint and no controversy existed as to the accumulation of penalties from that date forward. Finally, *Floersheim* involved a situation where the respondent had merely been informed that a particular course of action "may subject" him to civil penalties.[15] 494 F.2d at 952-53.

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[14] *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223 (1974); *Floersheim* v. *Engman*, 494 F.2d 949 (D.C. Cir. 1973); *United States* v. *Beatrice Foods Co.*, 322 F. Supp. 139 (D. Minn. 1971).

[15] In *Floersheim* the court declined to intervene in a dispute over the FTC's rejection of Floersheim's report of compliance with a litigated cease and desist order, which had been affirmed by the court of appeals for another circuit. The court rejected Floersheim's contention that he was forced either to face prospective civil penalties or acquiesce in an unlawful order. The court noted that Floersheim's remedy was first to take up the dispute with the Commission. If no accommodation could be reached, then Floersheim could have sought a clarification of mandate from the Ninth Circuit Court of Appeals, which had already reviewed the cease and desist order at issue.

Indeed, the opinion in *Floersheim* is inconsistent with the holding of the court below that the *Ex parte Young* principle is inapplicable to cases involving an agency's "interpretation" of its orders. The court of appeals stated in *Floersheim:*

> ". . . a person may have relief in equity to avoid *invalid official action* where the risk of penalties, if he is remitted to defense of enforcement actions, is so coercive as to be a denial of due process. Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Equitable doctrine has . . . been extended, with certain limitations, to an agency action that constitutes *a general interpretation* on the highest level, presenting a controversy fully ripe for review. National Automatic Laundry & Cleaning Council v. Schultz, 143 U.S. App. D.C. 274, 443 F.2d 689 (1971)." *Floersheim* v. *Engman, supra,* 494 F.2d at 954 (emphasis supplied).

In the present case, there has been final agency action at the highest level, by way of a formal "determination," affecting an entire industry. The realistic practical effect, if not the stated purpose of the administrative action at issue here—whether labeled an "interpretation" or a "determination"—is to put petitioners to the choice either of complying with an agency directive of dubious legality or of incurring the risk of substantial penalties as the cost of a good faith judicial test of that action.

Due process prohibits the threat of coercive penalties that undermine the opportunity for "substantial, adequate, and safely available" judicial review of questionable regulatory conduct. *See Oklahoma Operating Co.* v. *Love, supra,* 252 U.S. at 336; *Ford Motor Co.* v. *Coleman, supra,* 402 F. Supp. at 502-03 (Hart,

J., dissenting). Labeling that conduct as an "interpretation" does not alter this basic principle.[16]

2. The principle of *Ex parte Young* also cannot be avoided on the ground, emphasized by the court below, that by entering into the consent decrees, petitioners "waived the right further to challenge [the decrees'] validity." (A. 10a.) Petitioners did not waive their right to challenge, without running the risk of overwhelming penalties, the validity of any interpretations the Commission might choose to place on the decrees. Petitioners are entitled to an independent review of this final agency action, and to the attendant due process safeguards, apart from any review of the validity of the underlying order. *Cf. Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967); *National Automatic Laundry & Cleaning Council* v. *Shultz,* 443 F.2d 689 (D.C. Cir. 1971).

If this right is deemed waived by entering into a consent decree, there will be a serious impairment of the utility of consent decrees in the administration of the Federal Trade Commission Act, a result at odds with the purposes of the Act. The plan of regulation inherent in the FTC Act, as the government argued below, places primary reliance on the voluntary settlement of trade regulation disputes between the Commission and the business community. See *Holloway* v. *Bristol-Myers Corp.,* 485 F.2d 986, 998 (D.C. Cir. 1973). But if a respondent to an FTC complaint knows that due process will afford no relief from the threat of penalties *pendente lite* even where, as here, serious questions are raised regarding the correctness of a

[16] *See Columbia Broadcasting System* v. *United States,* 316 U.S. 407, 416 (1942) ("it is the substance" of agency action "which is decisive," not the "particular label placed upon it").

subsequent Commission interpretation, the incentive to enter into a consent decree is significantly reduced. Moreover, the chilling effect on litigation contesting the agency's "interpretation", fostered by the decision below, increases the danger that the Commission could with impunity effect a " 'substantial *modification* of the original decree' . . . . disguised as construction," *United States* v. *ITT Continental Baking Co., supra,* 420 U.S. at 236, n. 9 (citations omitted, emphasis in original), a practice which this Court sharply criticized.

3. The attempt of the courts below to distinguish this case from this Court's controlling precedents on the ground that the trial court has discretion under Section 5(*l*) as to the ultimate magnitude of any penalties that might be imposed here must also be rejected.[17] Whether the penalty involved is "mandatory," as in *St. Regis Paper Co.* v. *United States, supra,* or "discretionary" is irrelevant under the *Ex parte Young* line of cases.

In terms of the objective of preserving a "substantial, adequate, and safely available" right of review, some "mandatory" penalties may be far less inhibiting than "discretionary" penalties that expose a litigant to far greater risk. In *St. Regis Paper Co., supra,* the penalty for noncompliance was $100 per day. By contrast, in *Wadley So. Ry. Co.* v. *Georgia, supra,* noncompliance with the order exposed the company to penalties of up to $5,000 for each offense. It cannot be realistically asserted that the greater "discretionary" penalties obtainable in *Wadley* had less of a chilling

[17] This was the sole basis for the district court's refusal to adopt petitioners' due process arguments. (A. 18a-19a.) The court of appeals also referred to this purported distinction, but with less emphasis. (A. 12a.)

effect than the smaller "mandatory" penalties in *St. Regis.*[18]

Moreover, prospective litigants must assess their potential exposure to liability at the outset of suit, when they are deciding whether to insist on their right to a court test or to acquiesce in the agency demand. The possibility that a trial or appellate court may someday exercise leniency hardly cures the oppressive effect of potentially massive, ever-mounting penalties. Indeed, the very uncertainty which is alleged here to be the saving virtue of "discretionary" penalties serves, as a practical matter, only to strengthen the inhibitory effect on the right to seek full judicial review.

Finally, the court below overlooked the *daily* nature of the penalty, which necessarily entails that the party seeking judicial review must undergo a steadily mounting exposure simply by litigating. In *Ford Motor Co.* v. *Coleman, supra,* the court indicated that where penalties are "a direct impost inflating . . . because of the time required for the very exercise of the right of judicial review," they would run afoul of *Ex parte Young* and *Wadley So. Ry. Co.* v. *Georgia.* 402 F. Supp. at 485 (footnote omitted). This principle is fully applicable here.

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[18] In both *Wadley* and *St. Regis,* the litigant failed to follow available review procedures during the pendency of which the penalty provisions could have been stayed. *Compare Oklahoma Operating Co.* v. *Love, supra,* where the remedies were properly pursued and a stay of a discretionary penalty was held to be mandated by the Constitution. *See also Natural Gas Pipeline Co.* v. *Slattery,* 302 U.S. 300, 310 (1937) and *St. Louis, I. M. & So. Ry. Co.* v. *Williams, supra* (penalties would be stayed during challenge to statutory scheme setting minimum and maximum monetary penalties).

II. The Decision of the Court Below is in Conflict with the Decisions of Other Federal Courts.

We know of no case which has held, as did the court below, that the *Ex parte Young* line of cases is not applicable to agency "interpretations" that its orders have been violated. See the dicussion of *Floersheim* v. *Engman* at p. 15, *supra.* On the contrary, the district court in *Continental Baking Co.* v. *Dixon,* 283 F. Supp. 285 (D. Del. 1968), clearly stated that it would grant a stay of penalties under *Ex parte Young* in the situation where the FTC had determined that a respondent was in violation of a Commission cease and desist order.

That such an agency determination should give rise to a stay of penalties is illustrated by the recent decision in *Ford Motor Co.* v. *Coleman, supra.* An automobile manufacturer was directed to recall and repair certain automobiles after the Administrator of the National Highway and Traffic Safety Administration had made a "determination" that they had a safety related defect. The applicable statute provided that the manufacturer could contest the agency action in a judicial trial *de novo* where all due process rights may be exercised, but that the manufacturer would be subject to penalties if he sought judicial relief.

A divided three-judge court upheld the constitutionality of the statute. The majority reasoned that the constitutional right to a "substantial, adequate, and safely available" right of judicial review would be satisfied if the statute allowed the manufacturer "who has a substantial, nonfrivolous challenge to the validity of the Administrator's determination to obtain a preliminary injunction" staying the accrual of penalties until

the validity of the determination is litigated in a judicial forum. 402 F. Supp. at 482-83. The dissenting judge strongly supported the principle that due process requires an opportunity to challenge any adverse administrative action without incurring substantial penalties, but he concluded that the statute at issue did not adequately protect this due process right.

Here, as in *Ford,* the petitioners' conduct has been the subject of an agency "determination," with no opportunity for fair hearing before the agency on the question of compliance; here, as in *Ford,* the companies can escape penalties only by acquiescing in the "determination" and forgoing their right to judicial review. But the court of appeals has held, contrary to both the majority and the dissenting opinions in *Ford,* that the petitioners here *cannot* obtain a stay pending judicial review of the agency "determination"—even though both courts below recognized that the companies' claims raise serious questions going to the merits of the FTC's determination. (A. 14a, 17a.) That judgment cannot stand consistent with the mandates of due process.

REASONS FOR GRANTING THE STAY

The considerations noted above which warrant review of the decision of the court of appeals also warrant granting a stay of the accrual of penalties pending final action by this Court.

This conclusion is underscored by the language and history of Section 10(d) of the Administrative Pro-

cedure Act, 60 Stat. 243 (1946), 5 U.S.C. § 705 (1970). That section provides that

> "On such conditions as may be required, and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken . . . on application for certiorari . . . may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings."

In an "explanation" of this section, the Senate Judiciary Committee stated that the sentence quoted above

> "authorizes courts to postpone the effective dates of administrative judgments or rules in cases in which, as by subjection to criminal penalties, parties could otherwise have no real opportunity to seek judicial review except at their peril. There is no reason why such a rule should not be recognized as to administrative agencies, since it is applied in the case of legislation of Congress itself. [Citing, among other cases, *Ex parte Young, supra, Wadley So. Ry.* v. *Georgia, supra, St. Louis I. M. & So. Ry.* v. *Williams, supra,* and *Oklahoma Operating Co.* v. *Love, supra.*]" Senate Judiciary Committee Print, Reprinted in Administrative Procedure Act, Legislative History, 79th Cong., 2d Sess. 38 (1946).

Petitioners have specifically invoked 5 U.S.C. § 705 and relied upon the line of cases cited above throughout this litigation.[19] Moreover, in seeking a stay *pen-*

[19] Petitioners also rely on the All Writs Act, 28 U.S.C. § 1651, and this court's decision in *FTC* v. *Dean Foods Co.*, 384 U.S. 597 (1966). Since the federal courts ultimately have jurisdiction to review the merits of the FTC's "determination", the All Writs Act and *Dean Foods* require the conclusion that they are empowered to stay the accumulation of penalties to ensure that petitioners' right to seek that review is not rendered meaningless by an onerous and unconstitutional penalty scheme.

dente lite under these cases, petitioners are complying with the procedures which this Court sanctioned in *St. Regis Paper Co., supra,* as the appropriate vehicle for seeking the constitutional protection accorded by *Ex parte Young* and its progeny.[20]

Unless the Court now grants a stay pending disposition of this petition for certiorari, petitioners will be denied judicial review which meets the standards both Congress and the Constitution have mandated. The Court recognized this in *St. Regis Paper Co.,* where it did grant a stay of the accrual of penalties pending disposition of the petition for certiorari. 365 U.S. 858 (1961). Similar relief is warranted here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and an order should be entered staying the accumulation of civil penalties pending final action by this Court.

Respectfully submitted,

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[20] In *St. Regis Paper Co.*, 368 U.S. at 226, the Court, in holding that the petitioner was liable for penalties, stated that the petitioner should have sought pre-enforcement review immediately upon entry of the notices of default which started the accrual of penalties rather than waiting for the Government to institute suit. Citing *United States* v. *Morton Salt Co.*, 338 U.S. 632, 654 (1950), the Court stated,

> " 'we are not prepared to say that courts would be powerless' to act where such orders appear suspect and ruinous penalties would be sustained pending a good faith test of their validity."

ERNEST PEPPLES
BROWN & WILLIAMSON TOBACCO CORP.
Of Counsel

THOMAS F. AHRENSFELD
ALEXANDER HOLTZMAN
PHILIP MORRIS INCORPORATED
Of Counsel

MAX H. CROHN, JR.
R. J. REYNOLDS TOBACCO COMPANY
Of Counsel

ARTHUR STEVENS
LORILLARD TOBACCO
Of Counsel

C. F. HETSKO
AMERICAN BRANDS, INC.
Of Counsel

JOSEPH GREER
LIGGETT & MYERS INCORPORATED
Of Counsel

MARTIN LONDON
LEWIS A. KAPLAN
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
345 Park Avenue
New York, New York 10022
Attorneys for Brown & Williamson Tobacco Corporation

ABE KRASH
JEROME I. CHAPMAN
ALBERT H. KRAMER
ARNOLD & PORTER
1229 Nineteenth Street, N.W.
Washington, D.C. 20036

DONALD FRIED
CONBOY, HEWITT, O'BRIEN & BOARDMAN
20 Exchange Plaza
New York, New York 10005
Attorneys for Philip Morris Incorporated

PAUL C. WARNKE
JOHN F. KOVIN
HAROLD D. MURRY, JR.
CLIFFORD, WARNKE, GLASS, MCILWAIN & FINNEY
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

DAVIS, POLK & WARDWELL
One Chase Manhattan Plaza
New York, New York 10005
Attorneys for R. J. Reynolds Tobacco Company

IRVING SCHER
STANLEY A. ROTHSTEIN
WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10022
Attorneys for Loew's Theatres, Inc.

DANIEL J. O'NEILL
CHARLES K. O'NEILL
CHADBOURNE, PARKE, WHITESIDE & WOLFF
30 Rockefeller Plaza
New York, New York 10020

EUGENE R. ANDERSON
ANDERSON, RUSSELL, KILL & OLICK, P.C.
630 Fifth Avenue
New York, New York 10020
Attorneys for American Brands, Inc.

LAWRENCE G. MEYER
LINDA E. BUCK
PATTON, BOGGS & BLOW
1200 Seventeenth Street, N.W.
Washington, D.C. 20036

GRAINER R. BARRETT
75 Rockefeller Plaza
New York, New York 10020
Attorneys for Liggett & Myers Incorporated

March, 1976

APPENDIX

APPENDIX A

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the Constitution of the United States provides in pertinent part that

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

Section 16(a)(1) of the Federal Trade Commission Act, 38 Stat. 714, *as added,* 52 Stat. 11, *as amended* 15 U.S.C. § 56(a)(1) (Supp. IV, 1974), 88 Stat. 2199 (Jan. 4, 1975), provides in pertinent part that:

> "(A) before commencing, defending or intervening in, any civil action involving this chapter (including an action to collect a civil penalty) which the Commission, or the Attorney General on behalf the Commission, is authorized to commerce, defend, or intervene in, the Commission give written notification and undertakes to consult with the Attorney General with respect to such action; and
>
> "(B) the Attorney General fails within 45 days after receipt of such notification to commence, defend, or intervene in, such action;
>
> the Commission may commence, defend, or intervene in and supervise the litigation of, such action and any appeal of such action in its own name by any of its attorneys designated by it for such purpose."

Section 5(*l*) of the Federal Trade Commission Act, 38 Stat. 719, *as amended,* 15 U.S.C. 45(*l*) (Supp. III, 1973) provides that

> "Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more

than $10,000 for each violation .... Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission."

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 398-403—September Term, 1975

(Argued October 29, 1970 Decided: December 22, 1975)

Docket Nos. 75-6081, -6084-85, -6087-88, -6090

BROWN & WILLIAMSON TOBACCO CORP. ET AL., *Appellants*,

v.

LEWIS A. ENGMAN, CHAIRMAN, FEDERAL TRADE COMMISSION, et al., *Appellees*.

• • • • • • • • • • •

Before MULLIGAN, OAKES and MESKILL, *Circuit Judges*.

• • • • • • • • • • •

OAKES, *Circuit Judge:*

This appeal is from the denial of appellants' motion for a stay of penalties under Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*) (1975 Supp.). The motion for a stay was sought by the six appellants who collectively produce about 99 per cent of the cigarettes manufactured in the United States. The have instituted declaratory judgment actions to obtain review of the Federal Trade Commission's interpretation of six cease and desist consent orders previously entered against them. Appellants have sought review prior to any enforcement proceedings brought by the FTC. The United States District Court for the Southern District of New York, Charles H. Tenney, Judge, denied the motion for a stay. He concluded that appellants were not entitled to a stay as a matter of law and that they had failed to show that without the stay

they will suffer irreparable injury or that the balance of the equities tipped decidedly in their favor. We affirm.[1]

The consent orders here involved were formally issued by the FTC on March 30, 1972. Essentially they require, in very detailed terms as to size of print, location, color and shape, that appellants include in their newspaper, magazine and other periodical advertising the now famous Surgeon General's warning reading "Warning: The Surgeon General has determined that cigarette smoking is dangerous to your health." The history underlying the consent orders is not particularly relevant for present purposes, so that it is set out only in the margin.[2] Suffice it to say

[1] In the appellants' reply brief it was brought to our attention that the Government filed civil enforcement actions in the United States District Court for the District of Columbia on October 17, 1975. We understand by correspondence from the parties that there are motions by the appellants here and defendants therein to have the civil enforcement action dismissed for lack of jurisdiction and for improper venue, or to have the action transferred to the Southern District of New York. We also are aware that by order dated November 5, 1975, Judge Tenney dismissed the complaints underlying the present appeal, on the basis that he would decline to exercise jurisdiction in the light of the enforcement action in the District of Columbia. Appellants have filed a notice of appeal therefrom and by letter have sought to consolidate that appeal with the instant one. Consolidation is opposed by the Government.

We have considered whether Judge Tenney's order dismissing the action has rendered the present appeal moot. We have concluded, however, that affirmance of the dismissal will not necessarily make this appeal moot because still at issue is the question whether penalties that possibly accrued prior to the commencement of the District of Columbia action or the dismissal of the underlying complaint here should be stayed. As to consolidation, since the appeal herein has already been argued, the more orderly procedure appears to be to consider the issue of pre-enforcement stay of penalties separately as it has arisen.

[2] As taken essentially from the affidavit of Eric M. Rubin, an FTC staff attorney, the history was as follows: In June, 1964, after the Surgeon General released the Report of his Advisory Committee on Smoking and Health, the FTC issued a proposed rule requiring the inclusion of a health warning in all cigarette labeling and advertising. Congress, however, adopted the Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, 79 Stat. 282, requiring a health warning on all cigarette packages, but barring until July 1, 1969, the FTC from requiring such a warning in cigarette advertising. 1965 U.S. Code Cong. & Ad. News 2350, 2351. When that time expired the FTC again announced its intention to promulgate a trade regulation rule requiring a warning to be included in all cigarette advertising. Congress again intervened to enact the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. §§ 1331 *et seq.* This act prohibited radio and television advertising of cigarette and little cigars after January 1, 1971, 15 U.S.C. § 1335, and foreclosed any action by the FTC "with respect to its pending trade regulation rule proceeding" before July 1, 1971, 15 U.S.C. § 1336(a). The Act also required that if the FTC planned to take any action in this area after July 1, 1971, the Commission had to give six months' notification to Congress of its determination to do so. But Congress specifically left untouched the FTC's authority with respect to unfair or deceptive cigarette advertising acts or practices, 15 U.S.C. § 1336(b). On July 1, 1971, the FTC served on each of the appellants individual complaints charging them with failure to disclose the Surgeon General's warning. Agreements containing consent orders agreeing to such disclosure were negotiated in January of 1972 and in March of 1972 the orders were finally issued and thereafter served.

that the orders were entered into after negotiations resulting from the FTC's serving appellants with proposed complaints charging them with deceptive practices under 15 U.S.C. § 45(a) for the failure to disclose in their advertising the hazards of using cigarettes. The important thing for our purpose is that in the consent order each of the appellants waived "any further procedural steps" and "all rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement." It should also be mentioned that the consent orders required the submission of compliance reports. These reports were filed in September 1972, with the result that the FTC reported to Congress in December 1972 and January 1974 that industry practice was in substantial

compliance with the orders. Subsequently, however, the FTC claimed that prior to and since September 1972 appellants had engaged in practices which did not comply with the consent orders' detailed requirements. Accordingly the Commission initiated a compliance investigation. From November 1974 through January 1975 attempts apparently were made to settle the FTC's claims of violations of the orders, but the settlement negotiations broke down. The companies claim that the FTC demanded too high a sum as a penalty for past violations and the FTC counters that such a sum was not a condition to further negotiation, and that appellants had refused to accept the staff's interpretation of the consent orders. On March 17, 1975, appellants asked the FTC Commissioners to reject the staff's interpretation. On August 1, 1975, the Commission, by letters to the companies, formally indicated that the Commissioners supported the staff's interpretation and that pursuant to the provisions of 15 U.S.C. § 56(a)[3] it would notify the Attorney General of its intention to commence an action for civil penalties and for other relief on the basis of these violations. The letters of August 1 stated, however, that for certain of the alleged violations of the orders the Commission would hold the civil penalty action in abeyance for 180 days.[4] Appellants thereafter, on August 14, 1975, commenced actions for a judgment declaring that the "determinations" in the Commission's letters of August 1 are inconsistent with the provisions of the orders and that the appellants are not liable for civil penalties. They also sought an order staying pending final judgment the accumulation of penalties for alleged violations of the orders under Section 5 of the Act, 15 U.S.C. § 45.[5] The six complaints were consolidated, since they contain identical questions of law, and after a hearing the court denied the

[3] 15 U.S.C. § 56 provides in pertinent part:

> Whenever the Federal Trade Commission has reason to believe that any person, partnership, or corporation is liable to a penalty under section 54 of this title or under subsection (*l*) of section 45 of this title, it shall—
>
> (a) certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought for the enforcement of the provisions of such section or subsection . . . .

[4] The alleged violations for which immediate notification of the Department of Justice was to be made included omission of the warnings in vending machine display panels; omission or undersizing in promotional materials such as counter racks and calendars; undersizing or mispositioning of the warning in newspaper, magazine and other periodical advertising; and, in connection with foreign language advertising, mistranslation of the warning or use of a different language therein.

[5] 15 U.S.C. § 45(a)(1) declares unfair or deceptive acts in commerce unlawful. The statute empowers and directs the Commission to prevent such acts, 15 U.S.C. § 45(a)(6). It authorizes the issuance of cease and desist complaints, provides for agency hearings thereon and affords review of FTC orders in the court of appeals. 15 U.S.C. § 45(b)-(d). The penalties for violation of orders are set forth in 15 U.S.C. § 45(*l*) as follows:

> Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

For a general discussion of the penalty mechanism, *see United States* v. *J. B. Williams Co.*, 498 F.2d 414 (2d Cir. 1974), *noted in* 41 Brooklyn L. Rev. 792 (1975), 43 Geo. Wash. L. Rev. 307 (1975), 88 Harv. L. Rev. 1035 (1975).

motion for a stay of penalties, treating it essentially as an application for a preliminary injunction.

Appellants principally argue that they are entitled to a stay of the accrual of civil penalties as a matter of law. They do so on the basis of a series of Supreme Court decisions which commenced with *Ex parte Young*, 209 U.S. 123 (1908), and include *Wadley Southern Railway Co.* v. *Georgia*, 235 U.S. 651 (1915); *Oklahoma Operating Co.* v. *Love*, 252 U.S. 331 (1920); and *St. Regis Paper Co.* v. *United States*, 368 U.S. 208 (1961).[6] The argument is that a party whose conduct is made subject to administrative action must be given the opportunity to obtain a judicial test of the validity of such action and, further, as a matter of due process of law, cannot be subjected to the risk that substantial penalties will accumulate during the course of the judicial proceeding. This line of cases is based on the

[6] *Ex parte Young*, 209 U.S. 123 (1908), held that state statutes establishing maximum rail rates and providing large penalties (including imprisonment) for violation thereof were constitutionally invalid since the parties had been given no opportunity to contest validity of the rates and were effectively denied judicial review of the rates by the magnitude of the penalties. *Id.* at 147-48. *Wadley Southern Ry.* v. *Georgia*, 235 U.S. 651, 669 (1915), held that where a state railroad commission joint rate order was made after hearing and where the carrier did not avail itself of a "safe, adequate, and available" statutory judicial review to test the validity of the order, the statute authorizing a $5,000 a day penalty for violation was not invalid. *Oklahoma Operating Co.* v. *Love*, 252 U.S. 331 (1920), followed *Young* where there was no opportunity for judicial review of a state agency order. *St. Regis Paper Co.* v. *United States*, 368 U.S. 208 (1961), held that fixed statutory forfeitures of $100 per day for failure to file special reports in compliance with FTC orders were not invalid where "petitioner did not try to obtain judicial review prior to the commencement" of the Government's penalty action, and where the petitioner did not "seek a stay once the litigation had begun." *Id.* at 225. The Court seemed to indicate that a declaratory judgment action would have lain to contest the validity of the orders and pointed out that even after the Government commenced the enforcement action a stay of penalties could have been but was not sought. *Id.* at 225-27.

reasoning that, regardless of the ultimate determination on the merits, due process requires that some real opportunity to challenge administrative action be afforded, and that such opportunity cannot exist where penalties are so great that noncompliance and a judicial challenge cannot be risked. The argument is the more compelling, the appellants suggest, in connection with FTC statutory penalties due to recent decisions, including our own *United States* v. *J. B. Williams Co.*, 498 F.2d 414, 435-36 (2d Cir. 1974), note 5 *supra*, which hold that penalties imposed for noncompliance with the Commission's cease and desist order may be computed on the basis of a separate violation for each day and for each advertisement.[7] Appellants thus claim that the district court's endorsement of the Government's position in this case is directly contrary to definitive Supreme Court decisions which embody the rule that a stay of penalties is required during a good faith judicial challenge to an agency determination.

Young, *Wadley*, *Love* and *St. Regis*, however, do not go as far as appellants suggest. Rather, they establish that one has a due process right to contest the *validity* of a legislative or administrative order affecting his affairs without necessarily having to face ruinous penalties if the suit is lost. The constitutional requirement is satisfied by a statutory scheme which provides an opportunity for testing the validity of statutes or administrative orders without incurring the prospect of debilitating or confiscatory penalties. As stated in *St. Louis, Iron Mountain & Southern Railway Co.* v. *Williams*, 251 U.S. 63, 65 (1919),

[7] Appellants argue that in the complaints filed in the District of Columbia enforcement action the FTC claims that each copy of every advertisement constitutes a separate violation of the consent order. On this basis, appellants urge that the potential liability for an advertisement in the Sunday New York Daily News with a circulation of 3 million is $30 billion. Their point that substantial penalties may be involved is made even though we need not accept their characterization of the FTC complaint.

> where such an opportunity [to contest the validity] is afforded and the [statute or administrative order] is adjudged valid, or the carrier fails to avail itself of the opportunity [to contest the validity], it then is admissible, so far as due process of law is concerned, for the State to enforce adherence to the rate by imposing substantial penalties for deviations from it.

See St. Regis, supra, 368 U.S. at 226-27; *Wadley, supra,* 235 U.S. at 667-69. *See also Ford Motor Co.* v. *Coleman,* Civil No. 75-1340 (D.D.C. Sept. 22, 1975), slip op. at 8-10.

Here the penalties which the appellants seek to have stayed did not attach prior to their opportunity to contest the validity of the orders. Rather, the risk of penalties began to accrue only after the appellants entered into consent decrees which acknowledged the validity of the decrees and waived the right further to challenge their validity. The statutory scheme of the Federal Trade Commission Act contemplates ample opportunity to the company accused of a deceptive practice to test the initial validity of the order. It can do so by seeking a review in the United States Court of Appeals. 15 U.S.C. § 45(c); note 5 *supra; see United States* v. *J. B. Williams Co., supra,* 498 F.2d at 419 (majority opinion) and at 441 (dissenting opinion). In the instant case, however, it is not the *validity* of the consent orders that appellants contest; rather it is their interpretation by the FTC. The question whether one is entitled to a stay of penalties as a matter of law in a suit involving the enforcement of an admittedly valid administrative order is not concluded by the *Young* line of cases. Appellants have pointed to no cases which support their proposition that at the compliance or enforcement stage they are still entitled to a stay. The only cases in which the argument has been made have not accepted it, although they hardly have the weight here that the Commission would attribute to them. *See Floersheim* v. *Weinberger,* 346 F. Supp. 950, 956 (D.D.C. 1972), *modified on other grounds*

and aff'd sub nom. Floersheim v. *Engman,* 494 F.2d 949 (D.C. Cir. 1973); *United States* v. *Beatrice Foods Co.,* 322 F. Supp. 139, 141 n.1 (D. Minn. 1971).

We agree, of course, with the principle enunciated by the Supreme Court in *Wadley Southern Railway Co.* v. *Georgia, supra,* 235 U.S. at 661, that a right of judicial review is merely "nominal and illusory" if it must be exercised "only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law." But the legality of the orders here is entirely certain. The penalties are accruing in this case, if at all, only by virtue of noncompliance with perfectly valid administrative orders. At this stage the right of the government to impose fines and penalties for violation of the laws appears equally indisputable. As *Wadley* states, "there is no room to doubt the power of the State to impose a punishment heavy enough to secure obedience to such orders after they have been found to be lawful; nor to impose a penalty for acts of disobedience, committed after the carrier had ample opportunity to test the validity of administrative orders and failed so to do." 235 U.S. at 667. *Cf. Calero-Toledo* v. *Pierson Yacht Leasing Co.,* 416 U.S. 663, 684-85 n.24 (1974).

Appellants argue, of course, that it is the risk of huge accumulating penalties during the course of the enforcement proceedings in this case which calls into play the Supreme Court cases and requires the granting of the temporary relief sought. But while the cumulative aspect of Section 45(*l*) penalties is severe, *see United States* v. *J. B. Williams Co., supra,* 498 F.2d at 435-36, it very plainly was the view of Congress that such cumulative penalties might be the only way to enforce FTC orders in the face of profitable, repeated or continuing violations. *See* 96 Cong. Rec. 2974 (1950) (remarks of Congressman Cooley); *id.* at 2981 (remarks of Congressman Poage); *id.* at 3018-19 (re-

marks of Senator George); *id.*, at 3025 (remarks of Senator Aiken). The legislative history of the Act, according to *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 231 (1975),

> makes clear that Congress was concerned with avoiding a situation in which the statutory penalty would be regarded by potential violators of FTC orders as nothing more than an acceptable cost of violation, rather than as a deterrence to violation. For example, Senator Aiken, chief proponent of the 1950 amendment, said that if daily penalties for certain violations of the Federal Trade Commission Act were not permitted, "the fine would amount to a license in the amount of $5,000 for misrepresentation, which would be a very cheap fine, indeed."

The cumulative penalty sections of Section 45(*l*) were held to be fair in *ITT Continental Baking Co.* because they were reasonably related to deterring cumulative violations of FTC orders in two situations: first, where detriment to the public and the advantage to the violator increases with delay of enforcement, and, second, where there exists a continuing ability on the part of the violator to eliminate the effects of his violation if so motivated. 420 U.S. at 232-33. We are satisfied, therefore, that § 45(*l*) cumulative penalties are not violative of due process under the circumstances of this case and that appellants are not entitled to a stay of penalties as a matter of law. We may point out in passing that while § 45 penalties are cumulative, they are also subject to the limitation of judicial discretion upon the penalties imposed.[8] Moreover, our own decision in

[8] Indicative of this are the following statements from the floor which attended passage of the 1950 Amendment to 15 U.S.C. § 45(*l*):

> [I]t is inconceivable to me that any Federal court would impose penalties under this section which are not reasonably related both to the seriousness of the offense charged and the size and resources of the defendant.

96 Cong. Rec. 2974, 3026 (1950) (letter from W. T. Kelley, General Counsel FTC, to Senator Fulbright).

> In no event would the court sanction any unreasonable penalty, or any such total penalty as would be destructive of legitimate business. So, therefore, I do not think there is any real danger here to legitimate business.

96 Cong. Rec. 3019 (1950) (remarks of Senator George).

The courts have recognized the limitation inherent in this section. *See United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 229 n.6 (1975) (". . . the statutes prescribe no minimum penalty, and the District Court has discretion to determine the amount of the penalty for each violation whether the transactions are construed as single or as continuing violations"). *See also United States* v. *J. B. Williams Co.*, 498 F.2d 414, 438 (2d Cir. 1974); *Floersheim* v. *Engman*, 494 F.2d 949, 952-54 (D.C. Cir. 1973); *Ford Motor Co.* v. *Coleman*, Civil No. 75-1340 (D.D.C. Sept. 22, 1975), slip op. at 17 n. 44.

United States v. *J. B. Williams Co., supra,* held that in any penalty action there is a right to jury trial on contested issues of fact.

Appellants also argue that even under the district court's approach of treating the motion for a stay as an application for preliminary injunction they are entitled to relief. We need not again set forth our settled rule that to obtain such relief the litigant must either demonstrate a combination of probable success on the merits and the possibility of irreparable injury or, in the alternative, that he has raised serious questions going to the merits and that the balance of hardships tips "decidedly" in his favor. *San Filippo* v. *United Brotherhood of Carpenters and Joiners of America,* No. 75-7394 (2d Cir. Oct. 28, 1975), slip op. 6387, 6392; *Stamicarbon, N.V.* v. *American Cyanamid Co.*, 506 F.2d 532, 536 (2d Cir. 1974). Ultimately those motions are addressed to the discretion of the district court and its decision should not be disturbed unless an abuse of discretion is shown. In this regard, and particularly in this type

of case, we must recall that courts of equity may go much further both to give or to withhold relief in furtherance of the public interest than where only private interests are involved. *See Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 156 (1967); *Yakus* v. *United States,* 321 U.S. 414, 441 (1944); *Gulf & Western Industries, Inc.* v. *Great Atlantic & Pacific Tea Co.,* 476 F.2d 687, 699 (2d Cir. 1973).

We agree with Judge Tenney below that appellants have doubtless posed a serious question on the merits. However, the limitations on the imposition of Section 45(*l*) penalties which we have discussed above, *see, e.g., Floersheim* v. *Engman,* 494 F.2d 949, 953 (D.C. Cir. 1973) ("There is room for leniency by the court, if petitioner's view of the meaning of the order is plausible and not defiant"), coupled with the strong public interest militating against the stay, preclude any finding that appellants have met their burden of showing that the equities tipped decidedly in their favor. We agree with the court in *Floersheim* v. *Engman, supra,* that the "equitable limitations inherent in the Government's remedies are a substantial protection for respondent with a reasonable and bona fide claim." *See* note 8 *supra.* We also are of the view that if appellants' interpretation of the consent orders is incorrect, granting the stay would infringe the public interest in receiving adequate warnings on the hazards of cigarette smoking. We put no stock in the intimation in the appellants' brief that the public interest is not involved because Congress has specifically required warnings on cigarette packages but not on advertising. *See* note 2 *supra.* Nowhere has Congress suggested that the FTC should not continue to handle the matter of cigarette advertising, and deceptive advertising practices in general, within the confines of its existing complaint procedures under Section 45. *See* note 2 *supra.* It may be, as appellants claim, that the Commission's views on noncompliance relate to alleged "minuscule variations in type size and type style" and "to technical aspects" of

the consent orders, but the Surgeon General's warning is a serious message which substantially affects the public interest. Noncompliance with the Commission's order is not a matter lightly to be endured.

Judgment affirmed.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 Civ. 4047 (CHT)
75 Civ. 4048 (KTD)
75 Civ. 4049 (KTD)
75 Civ. 4050 (CBM)
75 Civ. 4051 (CLB)
75 Civ. 4052 (CLB)

BROWN & WILLIAMSON TOBACCO CORPORATION, et al.,
Plaintiff

—against—

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al., *Defendants.*

MEMORANDUM

TENNEY, J.

Plaintiffs, the six major producers of cigarettes in this country,[1] have moved by order to show cause for an Order of this Court granting them preliminary injunctive relief staying, pending final judgment, the accumulation of civil penalties for alleged violations of the identical consent orders entered into by each of the companies with the Federal Trade Commission in March of 1972. For the reasons stated below, the request for a preliminary injunction is denied.

The purpose of a preliminary injunction is to preserve the status quo pending a determination on the merits.

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[1] Mr. Weisberg, the Assistant United States Attorney, made a motion on the record in open court on August 25, 1975 for consolidation of the six cases filed in this Court. The motion was granted and the Assistant United States Attorney was directed to submit an order to that effect.

Checker Motors Corp. v. *Chrysler Corp.*, 405 F.2d 319, 323 (2d Cir.), *cert. denied*, 394 U.S. 999 (1969); *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F.2d 738, 742 (2d Cir. 1953). Such an injunction may never be obtained as a matter of right, but is clearly addressed to the discretion of the district court. *Yakus* v. *United States*, 321 U.S. 414 (1944); *Checker Motors Corp.* v. *Chrysler Corp., supra*, 405 F.2d at 323.

Historically this remedy has been viewed as drastic or extraordinary in nature and, absent a clear showing that movant has carried the burden of persuasion, the relief will be denied. *Dopp* v. *Franklin National Bank*, 461 F.2d 873, 878 (2d Cir. 1972); *Checker Motors Corp.* v. *Chrysler Corp., supra*, 405 F.2d at 323. That burden consists of showing either a reasonable probability of success on the merits and irreparable injury or that movants have raised serious questions going to the merits and that the balancing of the equities tips decidedly in their favor. *Robert W. Stark, Jr., Inc.* v. *New York Stock Exchange, Inc.*, 466 F.2d 743, 744 (2d Cir. 1972); *Checker Motors Corp.* v. *Chrysler Corp., supra*, 405 F.2d at 323; *Crimmins* v. *American Stock Exchange, Inc.*, 346 F. Supp. 1256, 1258-59 (S.D.N.Y. 1972). An additional factor of relevance to be considered is the public interest. *American Motorists Ins. Co.* v. *City Wide Transportation Co.*, 308 F. Supp. 1080, 1084 (S.D.N.Y. 1969); 7 J. Moore, Federal Practice ¶ 65.04[1], at 47 (2d ed. 1948).

Since the issues of irreparable harm, the balancing of the equities, and the public interest will be dispositive of the motion, the Court will move directly to a consideration of those issues. Assuming, for the moment, that plaintiffs have at least raised serious questions going to the merits, they must then demonsrate that, on balance, the equities in the present situation tip decidedly in their favor. In the alternative, assuming that plaintiffs have demonstrated a reasonable probability of success on the merits, then they

must further demonstrate irreparable injury in the absence of the relief requested.

On the question of irreparable injury, plaintiffs allege that they face a denial of due process should the stay be denied. In the absence of this relief, plaintiffs feel that they are placed in an impossible predicament, *i.e.*, they are faced with a choice of acquiesing in the findings of the Federal Trade Commission (regarding violations of the 1972 consent order) which they consider to be erroneous, or of awaiting the Commission's enforcement proceeding in the face of ever-mounting civil penalties. This dilemma, plaintiffs contend, would, in effect, deny them a forum in which to protest the ruling and, in doing so, deny them due process. In support of this argument they cite *St. Regis Paper Co.* v. *United States,* 368 U.S. 208 (1961).

The *St. Regis* case, however, is distinguishable from the instant case. The penalty provision applicable in *St. Regis* was mandatory in nature. The penalty provision applicable in the instant case, 15 U.S.C. § 45(*l*), reads as follows:

> "(*l*) Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of *not more than $10,000 for each violation,* which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of

> such final orders of the Commission." (Supp. 1975) (emphasis added).

As can clearly be seen, the penalty provision of § 45(*l*) merely fixes the upper limit of the penalty and any penalties to be ultimately assessed are discretionary with the court. *United States* v. *J. B. Williams Company, Inc.,* 498 F.2d 414, 438 (2d Cir. 1974); *United States* v. *Beatrice Foods Co.,* 322 F. Supp. 139, 141 (D. Minn. 1971).

In reaching its decision as to the imposition of penalties, the Court may consider, *inter alia,* the ability of the violator to pay, the good or bad faith of the violator, the degree of due care exercised, the injury to the public, and the delay on the part of the Federal Trade Commission in initiating the enforcement suit. *United States* v. *J. B. Williams Company, Inc., supra,* 498 F.2d at 438; *United States* v. *Ancorp National Services, Inc.,* 367 F. Supp. 1221, 1224 (S.D.N.Y. 1973); *United States* v. *Beatrice Foods Company,* 351 F. Supp. 969, 971 (D. Minn. 1972), *aff'd,* 493 F.2d 1259 (8th Cir. 1974), *cert. denied,* 43 U.S.L.W. 3474 (U.S. March 4, 1975); *United States* v. *H. M. Prince Textiles, Inc.,* 262 F. Supp. 383, 388-89 (S.D.N.Y. 1966). Thus, penalties to be assessed, if any, will be tempered by these considerations.

In addressing this question as well as the question of the public interest involved in the request for a stay of an assessment of penalties under § 45(*l*), the United States District Court for the District of Columbia (per Parker, J.) stated:

> "The strong public interest in this area requires that possible penalties not be stayed pending such litigation in order to avoid encouraging frivolous suits for purposes of delay. Of course court administrative delays and the plaintiff's good faith on the one hand, and, as in this case, the unreasonableness or frivolousness of plaintiff's grounds for review on the other hand, are factors which a court may consider in assessing pen-

alties. United States v. H. M. Prince Textiles, Inc., 262 F. Supp. 383 (S.D.N.Y. 1966)." *Floersheim* v. *Weinburger,* 346 F. Supp. 950, 956 (D.D.C. 1972).

This Court is in agreement with the views expressed by Judge Parker in *Floersheim* and must conclude that plaintiffs have failed in their burden of showing either irreparable injury or that the balancing of the equities tips decidedly in their favor. Far from being subjected to a denial of due process, plaintiffs' risks here are no greater than the risks attendant in any litigation. In the face of these findings and in light of the remarks made by Judge Parker in *Floersheim,* it seems unnecessary to comment further on the quesion of the public interest.

Accordingly, plaintiffs' motion for a preliminary injunction is denied.

So ordered.

Dated: New York, New York
August 28, 1975

/s/ Charles H. Tenney
Charles H. Tenney
U.S.D.J.

APPENDIX D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of January, one thousand nine hundred and seventy-six.

Present:	Hon. William H. Mulligan	75-6081
	Hon. James L. Oakes	75-6084-5
	Hon. Thomas J. Meskill	75-6087-8
	Circuit Judges	75-6090

Brown & Williamson Tobacco Corporation, et al., Plaintiff-Appellant, v. Lewis A. Engman, etc., et al., Defendants-Appellees.

(Filed January 29, 1976)

A petition for a rehearing having been filed herein by counsel for the appellant American Brands, Inc.

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. Daniel Fusaro
A. Daniel Fusaro
Clerk

APPENDIX E

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

OFFICE OF THE SECRETARY

August 1, 1975

American Brands, Inc.
245 Park Avenue
New York, New York 10017

Attention: Cyril Hetsko, Esquire
General Counsel

Re: American Brands, Inc.
Docket No. C-2182

Dear Mr. Hetsko:

The Federal Trade Commission has determined that American Brands has violated the above-captioned order by failing in certain cigarette advertisements to disclose the required health warning and by failing in other cigarette advertisements to disclose the health warning in the clear and conspicuous manner that is required by the order.

The Commission will, therefore, pursuant to the provisions of 15 U.S.C. 56(a)(1), notify the Attorney General of its intention to commence for these violations an action for civil penalties and other relief. For certain other violations of the order, the Commission will hold a civil penalty action in abeyance for 180 days. If, however, at the expiration of that period, American Brands has not corrected these other violations, the Commission will seek civil penalties and other relief for them as well.

The Commission will immediately notify the Department of Justice of its intention to file a complaint for the following violations of the order:

1) The advertisement of cigarettes on display panels inserted since July 1972 into vending machines

which fail to disclose the required health warning in violation of Section I-E of the order.

2) The advertisement of cigarettes on other promotional materials exhibited to the public since July, 1972, such as counter racks and shopping bags which fail to disclose the health warning or which disclose the health warning in a type size smaller than that required for the entire advertising display area in violation of Sections I-E or I-F of the order.

3) The advertisement of cigarettes in newspapers, magazines or other periodicals published and distributed in the United States since July, 1972, which appeared to the public with a disclosure of the health warning in a type style or type size smaller than that required for the advertisement's trim size, in violation of Section I-C of the order.

4) Foreign language cigarette advertisements published and distributed, or otherwise exhibited to the public, since November 13, 1973, which violate the order by disclosing the health warning in a language different from that principally used by the advertisement or in an inaccurate translation of the statement prescribed by Congress in Section 4 of the Public Health Cigarette Smoking Act of 1969.

The Commission has also determined that American Brands has failed to disclose the health warning on billboard and transit card advertisements clearly and conspicuously as required by the order. Section I-D of the order specifies minimum type sizes for different sizes of billboards and transit cards. Compliance with that provision, however, does not satisfy the overriding requirement established by the order that in these media the disclosure must be clear and conspicuous. Disclosures which conform

to the minimum size provisions of Section I-D but which nonetheless are not of sufficient size for the warning to be read by those who view the advertisement cannot be deemed to comply with the order.

Moreover, the Commission has also determined that the typographic composition of the health warning utilized by your company violates Sections I-C-2 and I-C-4 of the order by measuring the requisite leading and spacing distances from the type faces and not from the type shoulders.

The Commission will not, however, immediately initiate a civil penalty action regarding violations pertaining to the size of the warning on billboards and transit cards or pertaining to the typographic requirements for the leading and spacing of the warning if those violations are remedied within 180 days from receipt of this order.

The Commission received and carefully considered your company's Statement of Position prior to making its determination in this matter.

By direction of the Commission.

/s/ Charles A. Tobin
Charles A. Tobin
Secretary

cc: H. Thomas Austern, Esquire
c/o Covington & Burling
888 - 16th Street, N.W.
Washington, D.C. 20006

Horace R. Kornegay, Esquire
c/o The Tobacco Institute, Inc.
1776 K Street, N.W.
Washington, D.C. 20006